

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL D. TAYLOR, )  
Plaintiff, ) CASE NO. C12-1069-MJP-MAT  
v. )  
MICHAEL J. ASTRUE, Commissioner ) REPORT AND RECOMMENDATION  
of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
Defendant. ) APPEAL  
 )  
 )

Plaintiff Michael D. Taylor proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1961.<sup>1</sup> He completed high school, attended some college

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of  
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 courses, and received training as a machinist. (AR 24, 173-74.) Plaintiff previously worked  
 02 as a machinist, straightening roll operator, production assembler, fabricator assembler, and  
 03 motor vehicle assembler. (AR 27, 191-97.)

04 With a filing month of April 2009, plaintiff filed applications for DIB and SSI, alleging  
 05 disability beginning March 1, 2006 due to Crohn's disease and depression. (AR 145-54, 168.)  
 06 His applications were denied initially and on reconsideration, and he timely requested a  
 07 hearing.

08 On January 20, 2011, ALJ Laura Valente held a hearing, taking testimony from plaintiff  
 09 and a vocational expert (VE). (AR 1038-1110.) On February 25, 2011, the ALJ issued a  
 10 decision finding plaintiff not disabled. (AR 17-29.)

11 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
 12 on April 16, 2012 (AR 1-3), making the ALJ's decision the final decision of the Commissioner.  
 13 Plaintiff appealed this final decision of the Commissioner to this Court.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining  
 18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
 19 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
 20 not engaged in substantial gainful activity since the alleged onset date.

21 At step two, it must be determined whether a claimant suffers from a severe impairment.

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22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 The ALJ found plaintiff's degenerative disc disease and sacroilitis, Crohn's disease, and  
02 depressive disorder severe. Step three asks whether a claimant's impairments meet or equal a  
03 listed impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of  
04 a listed impairment.

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
07 demonstrated an inability to perform past relevant work. The ALJ found plaintiff capable of  
08 performing light work, with an ability to lift and carry twenty pounds occasionally and ten  
09 pounds frequently, to stand/walk for two hours during an eight-hour workday, to sit without  
10 restrictions, and with postural activities allowed on an occasional basis except for frequent  
11 balancing, reaching, fingering bilaterally, and no climbing ladders/ropes/scaffolds. The ALJ  
12 also found plaintiff must avoid concentrated exposure to vibration and hazards, and was  
13 restricted to simple routine one-to-two step tasks. With this RFC, and with the assistance of  
14 the VE, the ALJ found plaintiff capable of performing his past relevant work as a production  
15 assembler as both actually and generally performed.

16 If a claimant demonstrates an inability to perform past relevant work or has no past  
17 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
18 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
19 the national economy. With consideration of the testimony of the VE, the ALJ alternatively  
20 found that jobs existed in significant numbers in the national economy that plaintiff could  
21 perform, such as call out operator and surveillance system monitor. The ALJ, therefore,  
22 concluded plaintiff was not under a disability at any time from the alleged onset date through

01 the date of the decision.

02 This Court's review of the ALJ's decision is limited to whether the decision is in  
 03 accordance with the law and the findings supported by substantial evidence in the record as a  
 04 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
 05 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
 06 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
 07 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
 08 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
 09 F.3d 947, 954 (9th Cir. 2002).

10 Plaintiff argues the ALJ failed to properly evaluate his Crohn's disease, with errors in  
 11 the consideration of a physician's opinion, the credibility and RFC assessments, and the  
 12 hypothetical to the VE. He also alleges errors at steps four and five of the sequential  
 13 evaluation. Plaintiff seeks remand for further administrative proceedings. The  
 14 Commissioner concedes error at step four, but argues that the ALJ's decision is otherwise  
 15 supported by substantial evidence and should be affirmed based on the step five decision.

16 Crohn's Disease

17 Plaintiff first observes that, while finding his Crohn's disease severe at step two, the  
 18 ALJ did not account for any non-exertional limitation attendant to that condition, such as  
 19 provision for bathroom access other than normal breaks at two-hour intervals. *See* Social  
 20 Security Ruling (SSR) 96-9p (normal work breaks occur at two-hour intervals). He notes the  
 21 VE's testimony as supporting the conclusion that unscheduled bathroom breaks would require  
 22 employer accommodation (*see* AR 1105-07), a factor not relevant in the Social Security

01 disability analysis. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (“[W]hen  
 02 the SSA determines whether an individual is disabled for SSDI purposes, it does not take the  
 03 possibility of ‘reasonable accommodation’ into account[.]” (adopted as SSR 00-1c).<sup>2</sup>

04       However, a step two severity finding does not necessarily imply an impairment will be  
 05 found to result in functional limitations sufficiently significant to affect the ability of a claimant  
 06 to perform work activities. *See, e.g., Griffeth v. Comm’r of Soc. Sec.*, No. 06-1236, 2007 U.S.  
 07 App. LEXIS 3153 at \*8-10 (6th Cir. Feb. 9, 2007) (“The ALJ’s finding that the limitation was  
 08 more than minimal [at step two]. . . was not inherently inconsistent with his finding that the  
 09 limitation has ‘little effect’ on the claimant’s ability to perform basic work-related activities.”);  
 10 *Shandley v. Astrue*, C11-0349-JLR, 2011 U.S. Dist. LEXIS 143491 at \*6-8 (W.D. Wash. Oct.  
 11 5, 2011) (citing other unpublished opinions finding same), *adopted* by 2011 U.S. Dist. LEXIS  
 12 136355 (Nov. 28, 2011).

13       At step two, a claimant must make a threshold showing that his medically determinable  
 14 impairments significantly limit his ability to perform basic work activities. *See Bowen v.*  
 15 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c). “[T]he step two inquiry is a *de*  
 16 *minimis* screening device to dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273,  
 17 1290 (9th Cir. 1996) (citing *Bowen*, 482 U.S. at 153-54). “An impairment or combination of  
 18 impairments can be found ‘not severe’ only if the evidence establishes a slight abnormality that

19  
 20       2 A narrow exception to this rule, not applicable in this case, allows for the relevance of  
 21 accommodation at step four with respect to past relevant work as actually performed and where the  
 22 accommodation was actually provided. Program Operations Manual System (POMS) DI  
 25005.020(E) (“If a previous employer offered accommodations that allowed the claimant to perform  
 PRW with his or her impairment, and the claimant retains the ability to do the PRW with the  
 accommodations in place, find the claimant able to do PRW even if the accommodations might not be  
 available in other workplaces or if work ceased because the employer removed the accommodations.”)

01 has ‘no more than a minimal effect on an individual’s ability to work.’” *Id.* (quoting SSR  
 02 85-28). Further, adjudicators must exercise “[g]reat care . . . in applying the not severe  
 03 impairment concept[,]” and, if “unable to determine clearly the effect of an impairment or  
 04 combination of impairments on the individual’s ability to do basic work activities,” should  
 05 continue the sequential evaluation process beyond step two. SSR 85-28.

06 An RFC assessment at step four, on the other hand, considers the most a claimant can do  
 07 considering his limitations or restrictions. 20 C.F.R. § 416.945(a); SSR 96-8p. In other  
 08 words, “the RFC is meant to describe the claimant’s residual abilities or what the claimant can  
 09 do, not what maladies a claimant suffers from – though the maladies will certainly inform the  
 10 ALJ’s conclusion about the claimant’s abilities.” *Howard v. Comm’r of Soc. Sec.*, 276 F.3d  
 11 235, 240 (6th Cir. 2002), *limited on other grounds as explained by Webb v. Comm’r of Soc.*  
 12 *Sec.*, 368 F.3d 629, 631-33 (6th Cir. 2004). Indeed, the governing regulation recognizes that a  
 13 claimant’s “impairment(s) and any related symptoms . . . may cause physical and mental  
 14 limitations that affect what you can do in a work setting.” 20 C.F.R. § 416.945(a) (emphasis  
 15 added). At step four, therefore, the ALJ must identify a claimant’s functional limitations or  
 16 restrictions, and assess his work-related abilities on a function-by-function basis. *See* 20  
 17 C.F.R. § 416.945; SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff’s  
 18 impairments, including those that are not severe, in determining RFC. § 416.945(e); SSR  
 19 96-8p. Further, a hypothetical posed to a VE must include all of the claimant’s functional  
 20 limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49  
 21 F.3d 562, 520-71 (9th Cir. 1995)).

22 The ALJ need not have included in the RFC assessment, or the corresponding

01 hypothetical to the VE, properly discounted opinion evidence or claimant testimony. *See*  
 02 *Batson v. Comm'r of the SSA*, 359 F.3d 1190, 1197 (9th Cir. 2004). Plaintiff here alleges the  
 03 ALJ erred in considering an opinion regarding his Crohn's disease from examining physician  
 04 Dr. Gary Gaffield and in assessing his credibility. However, in neither respect does plaintiff  
 05 demonstrate error.

06 A. Dr. Gary Gaffield

07 In the portion of a form containing his functional assessment/medical source statement,  
 08 Dr. Gary Gaffield stated: "The workplace environment would need to be aware of [plaintiff's]  
 09 Crohn's disease." (AR 688.) Plaintiff avers that Dr. Gaffield thus contemplated work-related  
 10 limitations attendant to his Crohn's disease and that, although purporting to give "great weight"  
 11 to Dr. Gaffield's opinions (*see* AR 26), the ALJ did not identify any such limitations and did not  
 12 give legally sufficient reasons for not including limitations in the RFC or hypothetical to the  
 13 VE. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (ALJ must provide clear and  
 14 convincing reasons for rejecting uncontradicted physician's opinions, and specific and  
 15 legitimate reasons for rejecting contradicted physician's opinions) and *Thomas*, 278 F.3d at 956  
 16 (hypothetical must include all limitations supported by record).

17 As argued by the Commissioner, however, plaintiff fails to demonstrate reversible error  
 18 in the consideration of his Crohn's disease. Dr. Gaffield had the opportunity to assess  
 19 limitations associated with plaintiff's Crohn's disease and did not do so. Instead, after he  
 20 assessed numerous specific limitations associated with plaintiff's other physical conditions –  
 21 including a two hour limitation on walking or standing and avoidance of ladders, steep stairs,  
 22 incline plains, and major obstacles based on foot sensitivity and lumbar spasms, lifting

01 limitations based on lumbar spasms, postural limitations based on restricted motion and  
 02 weakness in hips and lumbar spasms, and manipulative limitations based on reports regarding  
 03 plaintiff's hands – Dr. Gaffield stated only that “[t]he workplace environment would need to be  
 04 aware of his Crohn's disease.” (AR 688.) In fact, while Dr. Gaffield specifically mentioned  
 05 “adequate breaks and rest periods” in association with plaintiff's walking and standing  
 06 limitation, he declined to address any such factors in relation to plaintiff's Crohn's disease.

07 (*Id.*)

08 Plaintiff's contention that Dr. Gaffield contemplated a work restriction associated with  
 09 his Crohn's disease is no more than speculative. While plaintiff may posit a different  
 10 interpretation of the record, when evidence reasonably supports either confirming or reversing  
 11 the ALJ's decision, we may not substitute our judgment for that of the ALJ. *Tackett v. Apfel*,  
 12 180 F.3d 1094, 1098 (9th Cir. 1999). Here, it is apparent the ALJ did not read Dr. Gaffield's  
 13 report as including a restriction related to plaintiff's Crohn's disease and, as that reading of the  
 14 record can be deemed rational, the ALJ's interpretation should not be disturbed by this Court.

15 Plaintiff does not point to any other medical opinion as supporting specific limitations  
 16 associated with his Crohn's disease and not properly evaluated by the ALJ. He, instead,  
 17 appears to rely on his own opinion as to the limitations associated with his condition. (See  
 18 Dkt. 30 at 3 (“A claimant such as Taylor with Crohn's disease does not decide when he or she  
 19 has to go to the bathroom when afflicted by diarrhea. That is the nature of the impairment.  
 20 The claimant needs ready access to a bathroom and the ability to take unscheduled bathroom  
 21 breaks. The Court should remand for a determination of Taylor's need for ready access to a  
 22 bathroom and unscheduled breaks.”)) While his suggestion as to the need for bathroom access

01 appears quite reasonable, plaintiff bears the burden of proving an impairment is disabling.  
 02 *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir. 1985). He fails to provide sufficient support for  
 03 a functional limitation associated with his Crohn's disease.

04 B. Credibility Assessment

05 In assessing credibility, an ALJ must first determine whether a claimant presents  
 06 "objective medical evidence of an underlying impairment 'which could reasonably be expected  
 07 to produce the pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036  
 08 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). Given  
 09 presentation of such evidence, and absent evidence of malingering, an ALJ must provide clear  
 10 and convincing reasons to reject a claimant's testimony. *Id.* *See also Vertigan v. Halter*, 260  
 11 F.3d 1044, 1049 (9th Cir. 2001).

12 In finding a social security claimant's testimony unreliable, an ALJ must render a  
 13 credibility determination with sufficiently specific findings, supported by substantial evidence.  
 14 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible  
 15 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We  
 16 require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so  
 17 that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v.*  
 18 *Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ  
 19 may consider his reputation for truthfulness, inconsistencies either in his testimony or between  
 20 his testimony and his conduct, his daily activities, his work record, and testimony from  
 21 physicians and third parties concerning the nature, severity, and effect of the symptoms of  
 22 which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

01       The ALJ in this case found plaintiff's medically determinable impairments could be  
02 reasonably expected to cause the alleged symptoms, but that his statements concerning the  
03 intensity, persistence, and limiting effects of those symptoms were not credible to the extent  
04 inconsistent with the assessed RFC. Plaintiff targets several reasons proffered by the ALJ in  
05 support of her credibility assessment, arguing they did not cure the defect in the decision with  
06 respect to his Crohn's disease. Plaintiff does not, as stated above, establish a defect in the  
07 consideration of his Crohn's disease. Nor does plaintiff otherwise demonstrate reversible  
08 error in the consideration of his credibility.

09       Plaintiff first targets the following assessment by the ALJ:

10       Apparent exaggeration by the claimant concerning his symptoms only undercuts  
11 any possible belief given to his testimony and allegations. At the hearing, he  
12 reported that he needed to use the bathroom 6 to 8 times a day with each visit  
13 requiring 30 minutes. However, no such allegation is found in the various  
14 medical reports and chart notations comprising his medical record. If the  
15 claimant's life were actually as restricted as alleged, it is reasonable to infer that  
16 he would have told his medical care providers in the hope that something could  
17 be done to alleviate this problem. He also reported that he had numerous flares  
18 of Crohn's disease, even during his incarceration for robbery. Yet, the  
19 notations from his incarceration detail no such event.

20       (AR 25.) Plaintiff contends that, while disputing he had to use the bathroom as frequently as  
21 alleged, the ALJ failed to specify how frequently he needed to use the bathroom given his  
22 Crohn's disease if less frequently than alleged, but more frequently than every two hours.

23       Plaintiff's argument fails. The ALJ did not assess any limitation with respect to a need  
24 for more frequent breaks or otherwise related to plaintiff's need to use a bathroom. Again,  
25 plaintiff bore the burden of supporting the existence of any such limitation and does not  
26 demonstrate error in the ALJ's consideration of the evidence. Moreover, an ALJ may

01 appropriately consider a claimant's tendency to exaggerate in assessing credibility.  
 02 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). *See also* SSR 96-7p ("One strong  
 03 indication of the credibility of an individual's statements is their consistency, both internally  
 04 and with other information in the case record.") Here, the ALJ supported his finding as to  
 05 exaggeration, pointing to an absence of support in the medical record generally and specifically  
 06 in the incarceration-related records.

07 Plaintiff next avers the ALJ based his finding on immaterial inconsistencies as to when  
 08 he ceased his alcohol use. He posits that, because the ALJ did not find any substance use  
 09 disorder during the relevant time period, she could not reasonably find any intent to mislead  
 10 based on those immaterial inconsistencies. This argument also fails. The ALJ noted, as one  
 11 of a number of reasons for her credibility conclusion, inconsistent statements concerning  
 12 plaintiff's sobriety as "add[ing] support for disbelieving him." (AR 25.) Inconsistent  
 13 statements regarding alcohol use may be considered as a reason to reject a claimant's  
 14 testimony. *See Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999). Plaintiff provides no  
 15 support for the contention that such consideration may only occur where a substance use  
 16 disorder is found during the time period under consideration.

17 Finally, plaintiff takes issue with the following statement: "The fact of his  
 18 drug-seeking behavior implies superior mental abilities used to manipulate the medical system  
 19 to achieve his goals, rather than use those abilities to return to work." (AR 25.) Plaintiff  
 20 describes this reasoning as "unreasonable disparagement" and "pejorative." (Dkt. 28 at 10 and  
 21 Dkt. 30 at 5.) He contrasts this depiction of him as an "evil genius" (Dkt. 28 at 11) with the  
 22 ALJ's finding that he was mentally limited to one- and two-step tasks (Dkt. 30 at 5). He also

01 states that, as a related matter, the ALJ unreasonably found him not credible for seeking too  
 02 much medical treatment (i.e., relief from pain).

03 The ALJ employed an ill-fitting turn of phrase in describing plaintiff as possessing  
 04 “superior mental abilities[.]” (AR 25.) Excluding that particular phrase, however, her  
 05 reasoning was entirely appropriate. Prior to the statement at issue, the ALJ reasoned:

06 Also, the claimant’s actions suggest drug-seeking behavior. From December  
 07 2009 to October 2010, the claimant went to the emergency room at least 15  
 08 times for a variety of reasons including dental caries, low back pain, and  
 09 sciatica, for which he was prescribed medications like Percocet and vicodin on  
 10 each occasion. According to chart notations from the Providence Hospital, he  
 was admonished by the emergency room doctor to discontinue his pattern of  
 getting prescription refills for narcotics from the emergency room. While the  
 claimant maintains that his primary care physicians have prescribed Percocet or  
 vicodin for him, the medical record does not support this allegation.

11 (*Id.*) The ALJ reasonably and properly considered evidence of drug-seeking behavior.  
 12 *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001), *amended opinion at* 2001 U.S. App.  
 13 LEXIS 17960 (Aug. 9, 2001) (ALJ properly considered evidence of exaggeration of pain to  
 14 receive pain medication). *Accord Massey v. Comm’r SSA*, No. 10-35004, 2010 U.S. App.  
 15 LEXIS 21508 at \* 2 (9th Cir. Oct. 19, 2010) (ALJ’s interpretation of record that claimant  
 16 engaged in drug-seeking behavior is a clear and convincing reason for disregarding his  
 17 testimony). Moreover, rather than criticizing plaintiff for seeking too much treatment, the ALJ  
 18 went on to find that plaintiff failed to comply with prescribed treatment by stopping or cutting  
 19 down on several different types of medication. (AR 25.)

20 Also, even if the Court were to find the statement challenged by plaintiff to constitute  
 21 error, such error would be harmless. *See, e.g., Carmickle v. Commissioner, Soc. Sec. Admin.*,  
 22 533 F.3d 1155, 1162-63 (9th Cir. 2008) (error can be deemed harmless where “the ALJ’s

01 decision remains legally valid, despite such error.”) The ALJ in this case provided a number  
02 of additional reasons in support of her conclusion, all of which, as the above, can be deemed  
03 clear and convincing reasons to reject plaintiff’s testimony. (AR 24-26.) Those reasons  
04 included: (1) that the objective medical evidence did not support the degree of limitation  
05 alleged, *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (“While subjective pain  
06 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective  
07 medical evidence, the medical evidence is still a relevant factor in determining the severity of  
08 the claimant’s pain and its disabling effects.”) and *Carmickle*, 533 F.3d at 1161 (“Contradiction  
09 with the medical record is a sufficient basis for rejecting the claimant’s subjective testimony.”)  
10 (cited source omitted); (2) that plaintiff’s activity level did not support his allegations,  
11 *Tonapetyan*, 242 F.3d at 1148 (ALJ appropriately considers inconsistencies or contradictions  
12 between a claimant’s statements and activities of daily living); (3) a disconnect between  
13 allegations about the severity of plaintiff’s symptoms and his general physical condition, *see*,  
14 *e.g.*, *Marcia v. Sullivan*, 900 F.2d 172, 177, n.6 (9th Cir. 1990) (“ALJ may rely on his own  
15 observations when determining whether a claimant is exaggerating an impairment,” so long as  
16 those observations are not “used as a substitute for medical diagnosis.”) (cited sources omitted);  
17 (4) a disconnect between plaintiff’s various allegations, *Light*, 119 F.3d at 792 (ALJ may  
18 consider inconsistencies in testimony or between testimony and conduct, daily activities, and/or  
19 work record); and (5) plaintiff’s failure to follow his medical regimen, *Molina v. Astrue*, 674  
20 F.3d 1104, 1113-14 (9th Cir. 2012) (“We have long held that, in assessing a claimant’s  
21 credibility, the ALJ may properly rely on unexplained or inadequately explained failure to seek  
22 treatment or to follow a prescribed course of treatment.”) (quoted sources and internal quotation

01 marks omitted). (*Id.*)

02 In sum, plaintiff fails to support his contention of error in the credibility assessment,  
 03 either as related to his Crohn's disease or overall. The ALJ's consideration of plaintiff's  
 04 Crohn's disease should, therefore, be affirmed.

05 Step Five Decision

06 As the Commissioner concedes error at step four, the Court need only consider the  
 07 arguments raised in relation to step five. At step five, with consideration of the VE's  
 08 testimony, the ALJ identified two occupations in determining plaintiff could make a successful  
 09 adjustment to other work: call out operator (Dictionary of Occupational Title (DOT)  
 10 237.367-014) and surveillance system monitor (DOT 379.367-010). (AR 28.)

11 The DOT raises a rebuttable presumption as to job classification. *Johnson v. Shalala*,  
 12 60 F.3d 1428, 1435-36 (9th Cir. 1995). Pursuant to SSR 00-4p, an ALJ has an affirmative  
 13 responsibility to inquire as to whether a VE's testimony is consistent with the DOT and, if there  
 14 is a conflict, determine whether the VE's explanation for such a conflict is reasonable.  
 15 *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007). As stated by the Ninth Circuit  
 16 Court of Appeals: “[A]n ALJ may rely on expert testimony which contradicts the DOT, but  
 17 only insofar as the record contains persuasive evidence to support the deviation.” *Johnson*, 60  
 18 F.3d at 1435-36 (VE testified specifically about the characteristics of local jobs and found their  
 19 characteristics to be sedentary, despite DOT classification as light work). *See also Pinto v.*  
 20 *Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (“We merely hold that in order for an ALJ to rely  
 21 on a job description in the [DOT] that fails to comport with a claimant's noted limitations, the  
 22 ALJ must definitively explain this deviation.”)

01 Plaintiff argues substantial evidence does not support the ALJ's decision at step five  
 02 because both of the identified positions require the ability to perform "reasoning level 3" work,  
 03 while the ALJ restricted plaintiff to simple routine one-to-two step tasks. *See* DOT  
 04 237.367-014 and DOT 379.367-010 (both defined as reasoning level 3 work); (AR 23  
 05 (assessing plaintiff as restricted to "simple routine one-to-two step tasks) and AR 1098 (posing  
 06 hypothetical to VE entailing "simple, repetitive, one to two step tasks.")) Plaintiff contends  
 07 that the only work consistent with the RFC and corresponding hypothetical is reasoning level 1  
 08 work, which requires an individual: "Apply commonsense understanding to carry out simple  
 09 one- or two-step instructions. Deal with standardized situations with occasional or no  
 10 variables in or from these situations encountered on the job." DOT, App. C. Reasoning  
 11 level 3 work, on the other hand, requires that an individual: "Apply commonsense  
 12 understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal  
 13 with problems involving several concrete variables in or from standardized situations." *Id.*

14 The VE in this case, upon the ALJ's inquiry, stated his testimony was consistent with  
 15 the DOT. (AR 28, 1100-01.) Plaintiff avers that, given that neither the ALJ, nor the VE  
 16 apprehended the inconsistency between the requirements of the identified jobs and the  
 17 hypothetical reflecting his RFC, the ALJ unreasonably relied on incorrect testimony and the  
 18 step five decision lacks the support of substantial evidence.

19 The Commissioner denies the existence of any conflict. Reasoning development is one  
 20 aspect of the "General Educational Development (GED) Scale" used in assessing DOT job  
 21 listings. DOT, App. C. (the GED also addresses levels of mathematical and language  
 22 development). The DOT explains with respect to the GED: "This is education of a general

01 nature which does not have a recognized, fairly specific occupational objective.” DOT, App.

02 C. The Commissioner argues, therefore, that the GED does not reasonably correlate to RFC.

03 The Commissioner further points to evidence of plaintiff’s education and training.

04 (*See, e.g.*, AR 24 (noting claimant’s testimony that he was enrolled in college classes in creative

05 reading and history).) The Commissioner argues that the medical and vocational record in this

06 case persuasively support the ALJ’s finding that plaintiff could perform the unskilled jobs

07 identified at step five. *See* DOT 237.367-014 and 379.367-010 (both with a specific

08 vocational preparation (SVP) of 2) and SSR 00-4p (“Using the skill level definitions in 20 CFR

09 404.1568 and 416.968, unskilled work corresponds to an SVP of 1-2[.]”). He notes the

10 Court’s ability to “draw[] specific and legitimate inferences from the ALJ’s opinion.”

11 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

12 Both parties point to case law supportive of their positions. However, the Court finds a

13 thorough analysis of that case law unnecessary. As previously discussed by this Court in

14 detail, there is no Ninth Circuit authority addressing the correlation between the DOT reasoning

15 levels and functional limitations identified in an RFC assessment, and district courts, as well as

16 courts outside of this Circuit, are divided on the issue. *Skeens v. Astrue*, No. C12-5070-RAJ,

17 2012 U.S. Dist. LEXIS 145499 (W.D. Wash. Sep. 12, 2012) (describing case law), *adopted by*

18 2012 U.S. Dist. LEXIS 145498 (Oct. 9, 2012). In addressing the issue, this Court has on more

19 than one occasion employed an approach requiring a close reading of the ALJ’s RFC

20 assessment in order to determine how it compares to reasoning level requirements. *See id. at*

21 \*26 (RFC finding that plaintiff could understand ““simple 1 to 2 step instructions”” and

22 ““perform simple tasks[]”” was ““analogous to reasoning level 1 only.””); *Morgan v. Astrue*, No.

01 11-422-JLR, 2011 U.S. Dist. LEXIS 150675 at \*17-22 (W.D. Wash. Nov. 28, 2011), *adopted*  
 02 *by* 2011 U.S. Dist. LEXIS 143389 (Dec. 13, 2011) (“Importantly, the ALJ did not limit Ms.  
 03 Morgan to only one- to two-step tasks. Such a limitation would, the Court believes, more  
 04 clearly indicate a limitation to reasoning level 1 jobs, which includes jobs with only one- or  
 05 two-step instructions. Instead, the ALJ found Ms. Morgan had moderate limitations in daily  
 06 activities, social functioning, and concentration, persistence, and pace. . . . This level of  
 07 limitation does not conflict with a finding that Ms. Morgan can perform detailed but uninvolved  
 08 work—work that requires level 2 reasoning.”); *Healey v. Astrue*, No. C10-5679-RAJ, 2011  
 09 U.S. Dist. LEXIS 71112 at \*7-9 (W.D. Wash. May 24, 2011), *adopted by* 2011 U.S. Dist.  
 10 LEXIS 71115 (July 1, 2011) (finding reasoning level 2 jobs inconsistent with RFC finding  
 11 plaintiff “unable to perform ‘detailed’ tasks, as well as restricting her to ‘simple and repetitive’  
 12 tasks.”).

13 The task in this case is far easier than previously presented. That is, the Court’s  
 14 previous consideration of this issue would support a finding of inconsistency between the RFC  
 15 and reasoning level 2 work, which requires an individual: “Apply commonsense understanding  
 16 to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a  
 17 few concrete variables in or from standardized situations.” DOT App. C. *See Skeens*, 2012  
 18 U.S. Dist. LEXIS 145499 at \*26; *Healy*, 2011 U.S. Dist. LEXIS 71112 at \*7-9.<sup>3</sup> The VE here  
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20 3 As observed by the Commissioner and previously discussed by this Court, courts have  
 21 reached different conclusions when presented with similar circumstances. *See, e.g., Terry v. Astrue*,  
 22 580 F.3d 471, 478 (7th Cir. 2009) (finding no conflict established where plaintiff limited to “simple”  
 work and only reasoning level 3 jobs identified; considering that the claimant “finished high school,  
 completed training to become a certified nurse’s assistant, and has the cognitive capacity to follow  
 simple instructions.”); *Renfrow v. Astrue*, 496 F.3d 918, 921 (8th Cir. 2007) (finding failure to inquire as  
 to inconsistency with DOT harmless where hypothetical indicated claimant “cannot be expected to do

01 identified work requiring even greater ability, as encompassed in reasoning level 3.

02 The Court acknowledges the appeal of the Commissioner's argument that the record  
 03 could support a finding that plaintiff was capable of a greater reasoning ability. However, it is  
 04 the role of the ALJ to determine credibility and resolve ambiguities and conflicts in the  
 05 evidence. *Carmickle*, 533 F.3d 1155, 1164 (9th Cir. 2008) ("The ALJ is responsible for  
 06 resolving conflicts in the medical record."); *Thomas*, 278 F.3d at 956-57 ("When there is  
 07 conflicting medical evidence, the Secretary must determine credibility and resolve the  
 08 conflict.") (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). The ALJ in this  
 09 case assessed plaintiff as "restrict[ed] to simple routine one-to-two step tasks." (AR 23.) The  
 10 Commissioner does not identify, and the Court does not find, anything in the ALJ's decision  
 11 that would allow the drawing of a specific and legitimate inference that the ALJ concluded  
 12 plaintiff could perform the requirements of reasoning level 3 work. *See* DOT App. C  
 13 ("Apply commonsense understanding to carry out instructions furnished in written, oral, or  
 14 diagrammatic form. Deal with problems involving several concrete variables in or from  
 15 standardized situations.") Instead, the RFC finding is analogous to the definition of reasoning  
 16 level 1 work. *Id.* ("Apply commonsense understanding to carry out simple one- or two-step  
 17 instructions. Deal with standardized situations with occasional or no variables in or from these

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18 complex technical work" and the reasoning level 3 jobs identified were classified as unskilled and did  
 19 "not appear to be 'complex.'"); *Hackett v. Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005) (concluding  
 20 a limitation to "simple and routine work tasks" was inconsistent with a reasoning level 3 job and "more  
 21 consistent" with a reasoning level 2 job); *Meissl v. Barnhart*, 403 F.Supp.2d 981, 983 (C.D. Cal. 2005)  
 22 (finding no conflict between RFC limiting claimant to simple tasks performed at a routine or repetitive  
 pace and jobs requiring a reasoning level of 2: "Here, the ALJ found that Meissl could perform not just  
 simple tasks but also ones that had some element of repetitiveness to them. A reasoning level of one on  
 the DOT scale requires slightly less than this level of reasoning. While reasoning level two notes the  
 worker must be able to follow 'detailed' instructions, it also (as previously noted) downplayed the  
 rigorously of those instructions by labeling them as being 'uninvolved.'")

01 situations encountered on the job.”)

02 In sum, plaintiff identifies an inconsistency between the RFC/hypothetical to the VE  
03 and the jobs identified at step five. Neither the ALJ, nor the VE accounted for any such  
04 inconsistency. Accordingly, as argued by plaintiff, the ALJ erred in relying on the VE's  
05 testimony and the ALJ's step five decision lacks the support of substantial evidence. *See, e.g.*,  
06 *Pinto*, 249 F.3d at 847. This matter should be remanded for further consideration of whether  
07 plaintiff retains the capacity to make an adjustment to work that exists in significant levels in  
08 the national economy.

## CONCLUSION

10 For the reasons set forth above, this matter should be REMANDED for further  
11 administrative proceedings. A proposed order accompanies this Report and Recommendation.

12 DATED this 28th day of January, 2013.

Mary Alice Theiler  
Mary Alice Theiler  
United States Magistrate Judge